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No. 09-34

In the Supreme Court of the United States

PFIZER INC.,

Petitioner,

v.

RABI ABDULLAHI, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES

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Petitioner Pfizer Inc. respectfully submits this brief in reply to the Brief for the United States as *Amicus Curiae* ("Br.").

Just two Terms ago, the Government urged this Court to review an "expansi[ve]" Alien Tort Statute (ATS) decision by the Second Circuit, notwithstanding its interlocutory posture, because it "invite[d] lawsuits challenging the conduct of foreign governments toward their own citizens in their own countries." Brief for the United States as *Amicus Curiae* in Support of Petitioners in *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, No. 07-919, O.T. 2007 ("*Ntsebeza* Br."), 5. Now, the Government deems a similarly expansive Second Circuit decision "not of general significance for litigation under the ATS." Br. 9. The Government does not alleviate the Chamber's concern that the decision below, like the unreviewed decision in *Ntsebeza*, will "impose enormous costs on American business and chill U.S. business activity abroad." Brief for *Amicus Curiae* Chamber of Commerce of the United States of America ("Chamber Br.") 3.

The Government's effort to deter this Court from granting certiorari despite the importance of the questions presented is unpersuasive. The Government rests its argument that there is no circuit conflict on a plainly erroneous reading (Br. 13-14) of the Eleventh Circuit decision that is one of the decisions conflicting with the decision below. The Government suggests that this case is a poor vehicle because the claims of "*some* respondents" may someday become moot in light of a Nigerian claims process (*id.* at 21 (emphasis added)), even while admitting that the outcome of that process will not moot the U.S. claims

of those "respondents [who] did not file claims [in Nigeria] before the deadline." *Id.* at 8. The Government's other arguments are similarly unavailing.

This Court therefore should grant certiorari to review the Second Circuit's ruling that, contrary to rulings by the Eleventh and Ninth Circuits, ATS plaintiffs need show only an attenuated link between state and private actors, and that, alternatively, the conduct alleged here joins the narrow class of international law violations that may be asserted against purely private actors.

If, however, the Court is inclined to agree with the Government's position, the Court should not deny the Petition but rather should hold it pending *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, Nos. 09-1262 (petition filed April 15, 2010) & 09-1418 (cross-petition filed May 20, 2010) (noted in Br. 12-13 nn.4-5)).

I. THE GOVERNMENT FAILS TO DISPEL EITHER CIRCUIT SPLIT ALLEGED IN THE PETITION

A. The State Action Holding Below Conflicts With Other Circuits

1. The Government concedes that the Second Circuit majority below "did not mention any allegation of specific knowledge on the part of the [Nigerian] government of the allegedly nonconsensual nature of the test" (Br. 11), but contends that the majority "did not affirmatively hold that state action, or liability in actions under the ATS more generally, can be proved in the absence of such knowledge or participation in the alleged acts," and thus that the

"issue has been left undecided." *Id.* The decision below cannot support the Government's reading.

To begin with, the Government's position ignores the extensive dissent by Judge Wesley, which viewed the majority as rendering precisely the affirmative holding that the Government denies: "[I]t is not enough ... for a plaintiff to plead state involvement in *some activity* of the institution alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with the *activity that caused the injury* giving rise to the action." Pet. App. 101a (dissent) (internal quotation marks omitted; emphasis and ellipses in original). The majority did not contest Judge Wesley's characterization of its state-action holding, even though the majority did join issue with Judge Wesley in other respects. Compare Pet. App. 49a-50a (criticizing dissent in Point A), with *id.* at 50a-52a (not mentioning dissent in Point B, "State Action").

In addition, the Government's citations of the complaint (Br. 10-11) show that the Second Circuit *did* equate the Nigerian government's mere general facilitation of Pfizer's activities in Nigeria with "'participat[ion] in the conduct that violated international law'" (*id.* at 11 (quoting Pet. App. 50a)), in conflict with decisions of the Eleventh and Ninth Circuits requiring specific government involvement with the challenged acts. Thus the Government errs in suggesting that the Second Circuit at most erroneously applied "'a properly stated rule of law.'" Br. 11 (quoting Sup. Ct. R. 10).[1]

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[1] The Government incorrectly suggests (Br. 11-12 n.3) that the first question may be reconsidered under *Ash-*

2. Contrary to the Government's position (Br. 12-14), the majority's state-action holding squarely conflicts with holdings of the Eleventh and Ninth Circuits that ATS state action requires that the state actor knew of the specific "activity that caused the injury giving rise to the action." Pet. App. 101a (dissent) (internal quotation marks and emphasis omitted).

a. The Government focuses on an irrelevant part of *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), to suggest that that decision addressed only whether state action could be inferred from state "*in*action" (Br. 14). The Government ignores the portion of *Aldana* on which Petitioner relies (Pet. 17) to allege the conflict. This portion found insufficient a state's affirmative (but merely general) support of the private actor that committed the allegedly wrongful conduct—specifically, Guatemala's alleged "registration" of private security forces—which the court treated as separate from and "[i]n addition" to the allegations of state "inaction." *Id.* at 1248.

Similarly, *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008), considered reports that "paramilitaries are sometimes *supported* by the Co-

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croft v. *Iqbal*, 129 S.Ct. 1937 (2009). But the first question addresses not merely what a plaintiff must plead but what a plaintiff must establish *as a substantive matter* under the ATS to draw a link between a passive state actor and an active private actor. Several decisions in the circuit split were in the same, motion-to-dismiss posture. See, *e.g.*, *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009); *Abagninin* v. *AMVAC Chem. Corp.*,

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lombian military," but deemed this evidence insufficient to establish state action because the "reports are not evidence of state action regarding the murders described in the complaint" (emphasis added). Again, state inaction was not the focus.

b. The Ninth Circuit's decision in *Abagninin*, 545 F.3d 733, cannot be distinguished as "a holding about the elements of the specific kind of violation alleged in that case (a crime against humanity)." Br. 12-13. What counts under the ATS as state action transcends any particular international law violation by the directly acting private party. While it is true that the complaints here do not allege violations of the Rome Statute as in *Abagninin*, it is anomalous to hold (as the Ninth Circuit did in *Abagninin*) that a private actor must act under a foreign government's deliberate plan or policy to commit a crime against humanity, but to hold (as the Second Circuit did below) that a government may participate in a private actor's allegedly nonconsensual clinical trials without any specific knowledge of the lack of consent.

3. The Government fails to confront Petitioner's and the Chamber's argument (Chamber Br. 9-12) that the link the ATS requires between a foreign state and a private actor for deeming the private actor a state actor is the mirror image of what counts under the ATS as private party aiding and abetting of a foreign state. Because that mirror-image issue—as well as the threshold issue whether international or domestic law should govern the "linking" inquiry, see Supp. Br. for. Pet. (filed Oct. 7, 2009) 1-4; Br. 12-13 n.4—is raised by the petition in *Presbyterian Church* (No. 09-1262), the Petition should be held for *Presbyterian Church* even if the Court does not view

the Petition as otherwise certworthy. Plaintiffs' ATS complaints often cannot be neatly categorized into one or the other camp and different standards for the required state-private link would simply encourage strategic pleading. See, *e.g.*, *Chowdhury* v. *Worldtel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375, 386 (E.D.N.Y. 2008) ("The question is really who is aiding and abetting whom?").[2]

B. The Private Action Holding Below Conflicts With Other Circuits

1. The Government incorrectly asserts (Br. 15-16) that the Second Circuit did not hold that the supposed norm against nonconsensual medical trials may be enforced against a purely private actor. In discussing one of the key sources upon which the Circuit relied for this norm, the ICCPR, the Circuit clearly stated that "this prohibition is not limited to state actors; rather, it guarantees individuals the right to be free from nonconsensual medical experimentation by any entity," including "private actors." Pet. App. 33a. And although the Circuit did refer to actions of "Pfizer and the Nigerian government" at times, Pet. App. 42a, it also referred in several instances to conduct by Pfizer alone, *id.* ("The appellants allege that Pfizer knowingly and purposefully conducted such experiments on a large scale."); *id.* at 42a-43a ("the prohibition in question applies to the

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[2] Even if the Petition in this case did not present the questions presented by the cross-petition in *Presbyterian Church* (No. 09-1418), the Petition should still be held for that cross-petition because the issues go to subject-matter jurisdiction and therefore Petitioner may raise them at any stage.

testing of drugs without the consent of human subjects on the scale Pfizer allegedly conducted"). Thus, as Respondents agree, see Brief in Opposition 15 (reading decision below as "analyz[ing]" and "answer[ing]" the Petition's second question presented), the Second Circuit did hold on this issue.

In any event, if this Court concludes that the Circuit did not hold on this issue and that its failure to do so makes the second question unsuitable for review, the appropriate course would be to grant review of the first question, and, if the Court holds that state action was not alleged, remand for the Circuit to address directly whether there is a norm enforceable here against a private actor.

2. The Government fails to dispel the conflict between the decision below and decisions from other circuits concerning whether only a narrow class of violations—namely, "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987)—may be asserted under the ATS against purely private actors. That the other circuits addressed "particular cause[s] of action" (Br. 17) besides nonconsensual medical testing does not diminish the existence of a split on the overarching question whether only a narrow class of international law violations may be asserted against private actors. The other circuits addressed that overarching question. See, *e.g.*, *Aldana*, 416 F.3d at 1247 ("[s]tate-sponsored torture, *unlike torture by private actors*, likely violates international law and is therefore actionable under the [ATS]") (emphasis added); *Abagninin*, 545 F.3d at 741 ("The traditional conception

regarding crimes against humanity was that a policy must be present and must be that of a State ...."); *Cisneros* v. *Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007) (holding, in context of private actor defendant, that ATS recognizes "causes of action for war crimes and genocide but not torture and summary execution") (internal quotation marks omitted).

II. THE GOVERNMENT'S ASSERTED VEHICLE PROBLEMS ARE ILLUSORY

1. The Government observes (Br. 17-18), citing three non-ATS cases, that this Court sometimes denies certiorari where a case is in an interlocutory posture. But there are many counter-examples. See, *e.g.*, *Levin* v. *Commerce Energy, Inc.*, 130 S. Ct. 496 (2009) (Mem.); *Alvarez* v. *Smith*, 129 S. Ct. 1401 (2009) (Mem.); *Alaska* v. *Se. Alaska Conservation Council*, 128 S. Ct. 2995 (2008) (Mem.); *Pearson* v. *Callahan*, 552 U.S. 1279 (2008) (Mem.); *Altria Group, Inc.* v. *Good*, 552 U.S. 1162 (2008) (Mem.). Indeed, in *Ntsebeza*, the Government expressly urged this Court to grant certiorari notwithstanding the case's interlocutory posture, explaining:

> [T]he prospect of costly litigation under so expansive a theory of liability [as aiding and abetting] may hinder global investment in developing economies ....
>
> The adverse consequences of the decision below and additional such litigation are not confined to South Africa, and would not be met by the possibility that this case might be dismissed at some time in the future ....

> The court of appeals' decision also merits this Court's review at this time because of the precedential effect it has on other pending litigation.... The decision below will preclude any district courts within the Second Circuit from dismissing such claims, involving conduct in foreign countries, on the ground that aiding and abetting is not an available theory of liability. And because that Circuit covers New York, which is central to the Nation's domestic and international commerce, the decision invites plaintiffs to bring many such suits in that forum in the future.

Ntsebeza Br. 20-22 (internal quotation marks and citation omitted). See also EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 281 (9th ed. 2007) (interlocutory review is "particularly" appropriate "if the lower court's decision is patently incorrect and the interlocutory decision ... will have immediate consequences for the petitioner"); Chamber Br. 18 ("The uncertainty and unpredictablility that inhere in these ATS standards invite stigmatizing and vexatious lawsuits that are hard to dismiss even when firms have done nothing wrong.").

These same considerations apply here, and the Government does not distinguish its *Ntsebeza* position beyond asserting that the instant case presents a "challenge ... to the adequacy of ... allegations" rather than "an important issue of law." Br. 18 n.7. As shown above, that assertion is incorrect, as *Ntsebeza* and this case present the same overarching "important issue of law"—whether and when a private actor may be linked with a state actor under the ATS—

with the same practical consequences. See Chamber Br. 18-20. As the Chamber explains, the decision below will "impose enormous costs on American business and chill U.S. business activity abroad." *Id.* at 3.

2. Despite the fact that "corporate ATS cases typically endure for ... many years, with some lasting a decade" (Chamber Br. 18), the Government suggests two pre-trial mechanisms by which Petitioner might obtain dismissal of Respondents' complaints even if this Court denies certiorari now. Neither should preclude review.

a. The Government suggests (Br. 18) that Petitioner may obtain dismissal for *forum non conveniens* on remand. While that is true, it is no reason not to review the lower court's existing decision on ATS subject-matter jurisdiction. Lower courts "may" take up *forum non conveniens* before jurisdiction "when considerations of convenience, fairness, and judicial economy so warrant," *Sinochem Int'l Co.* v. *Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007), but they need not do so, and a *forum non conveniens* decision, unlike an ATS subject-matter jurisdiction decision, involves "a 'range of considerations'" beyond the complaint, including "'the practical difficulties that can attend the adjudication of a dispute in a certain locality,'" *id.* at 429 (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 723 (1996)). Moreover, *forum non conveniens* arguments are often met by plaintiffs' disparagement of the fairness of the foreign country's judicial system, see, *e.g.*, Pet. App. 143a (Respondents argued that "the Nigerian judiciary is known for rampant corruption and bias"), which causes "international friction" by making "do-

mestic courts ... sit in judgment over the conduct of the foreign state ....." *Ntsebeza* Br. 14.

b. The Government makes the novel suggestion (Br. 19-20) that Petitioner may advance the same argument it unsuccessfully asserted under Fed. R. Civ. P. 12(b)(1) in a new motion under Fed. R. Civ. P. 12(b)(6). The Government cites cases analyzing federal question jurisdiction and holding that only where the federal claim is "plainly insubstantial" is jurisdiction lacking; if the claim passes this standard but ultimately fails, the dismissal is on the merits. But that approach does not apply to the ATS, in which questions of jurisdiction and the merits are conjoined. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), for example, this Court did not ask whether the plaintiff's claim was "plainly insubstantial"; rather, it undertook a plenary analysis of "two well-known international agreements" and the plaintiff's complaint, *id.* at 734, under the rubric of determining whether to deem the plaintiff's "cause of action *subject to jurisdiction* under [28 U.S.C.] § 1350," 542 U.S. at 732 (emphasis added). Even if the Government's view were accepted, it would not avail Petitioner. The Second Circuit did not undertake an analysis whether Respondents' claims are "plainly insubstantial," but rather, like *Sosa*, undertook a plenary analysis. Accordingly, Petitioner's renewal of its argument in a Fed. R. Civ. P. 12(b)(6) motion would be futile, merely leading to the same outcome after wasteful cost and delay.

3. The Government contends that a final vehicle problem is raised by the possibility that "[i]f *some* respondents receive compensation from the [Nigerian] trust fund, the releases they would execute

likely moot *their claims* in this case." Br. 21 (emphasis added). But the Government acknowledges that other "respondents did not file claims before the deadline" for seeking recovery from that fund. *Id.* at 8. Accordingly, there is no possibility that *all* Respondents will receive compensation from the fund, execute releases, and moot their claims here.

Even as to those Respondents who met the deadline, there is substantial uncertainty whether they will ever execute releases. The Government concedes that "[i]t is not yet known how many respondents will submit to the DNA testing [to prove they were involved in the Trovan study] or be found eligible for compensation." *Id.* at 9. And on May 26, 2010, 192 persons, including apparently all 88 Respondents, filed suit in Nigeria against Pfizer, Kano State, the Nigerian federal government, and the Fund Board, seeking to enjoin the DNA sampling process and to recover damages.[3] This new suit casts substantial doubt on whether Respondents will ever release their claims here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] See, *e.g.*, "Court to hear case to halt Pfizer DNA test," EDMONTON JOURNAL, May 27, 2010 (available at http://www.edmontonjournal.com/business/Court+hear+case+halt+Pfizer+test/3076380/story.html) (last accessed June 6, 2010).

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